No. 87-1566

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL J. GUINAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred by admitting, pursuant to Fed. R. Evid. 804(b)(5), the grand jury testimony of a witness who was unavailable to testify at trial.

2. Whether the admission of the grand jury testimony of a witness who was unavailable to testify at trial violated the Confrontation Clause of the Sixth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 836 F.2d 350.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1988. The petition for a writ of certiorari was filed on March 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1983, a federal grand jury in the Northern District of Illinois was conducting an investigation of petitioner. The grand jury issued a subpoena to Lori Clarke,

petitioner's long-time paramour. Pet. App. 2; Tr. 11, 67.[1] She appeared before the grand jury on September 21, 1983, but invoked her Fifth Amendment privilege against compulsory self-incrimination. Tr. 12. Some time later, petitioner and Lori Clarke were married. Pet. App. 2.

On April 26, 1984, a four-count indictment was filed against petitioner, charging him with filing false income tax returns for the tax years 1977 and 1979 through 1981, in violation of 26 U.S.C. 7206(1). Four months later, on August 16, Lori Clarke, now Lori Guinan, telephoned IRS Special Agent Patrick McDermott. Lori Guinan told the agent that she and her husband were separated and that she had filed for divorce. She also indicated that she wanted to provide evidence about petitioner's finances. Pet. App. 1-2; Tr. 13-14. Lori Guinan impressed Agent McDermott as being angry with petitioner, but not bitter. Tr. 98, 108.

Thereafter, Lori Guinan met or spoke with Agent McDermott on at least ten occasions and continued to provide him with information, some of which was self-incriminating, such as her admission that she had committed forgeries and unlawfully used social security numbers. Tr. 15-16, 100, 205. She was not promised immunity, although she was told that her cooperation would be considered in deciding whether she would be prosecuted for those offenses. Pet. App. 2; Tr. 15, 129, 206. Based on the notes of his interviews and his telephone conversations with Lori Guinan, Agent McDermott prepared a written statement. Lori Guinan reviewed the statement with Agent McDermott or an Assistant United States Attorney on three occasions for about three and one-half hours. She was allowed to make changes in the statement and did

[1] "Tr." refers to the transcript of the evidentiary hearing held on the government's motion to introduce Lori Guinan's grand jury testimony pursuant to Fed. R. Evid. 804(b)(5).

make some minor revisions. Lori Guinan then signed the statement and read it under oath before a grand jury on September 20, 1984. Pet. App. 2; Tr. 23-24, 26, 110-111, 112, 207-208.

In her grand jury testimony, Lori Guinan identified herself as petitioner's wife, but she stated that she was separated from and planning to divorce him. Pet. App. 2. She stated that she had known petitioner since June 1976, and she testified about various aspects of his expenditures and financial arrangements between 1976 and 1984. *Id.* at 2-3. The day after she testified, September 21, 1984, the grand jury returned a superseding indictment against petitioner. The superseding indictment added two counts of filing false tax returns for the tax years 1978 and 1982. *Id.* at 3.

After her grand jury appearance, Lori Guinan met with Agent McDermott approximately five more times. Pet. App. 3; Tr. 18. In the course of her meetings with Agent McDermott, she never recanted any of her grand jury testimony. Pet. App. 3. She also retained an attorney and was promised immunity. Tr. 17. Agent McDermott last saw Lori Guinan on November 2, 1984. Tr. 18. Four days later, Lori Guinan disappeared. Pet. App. 3.[2]

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[2] Petitioner states (Pet. 8) that "[t]here was no showing Lori Guinan's unavailability was involuntary, or that [he] had anything to do with her failure to appear for trial as a witness." He concludes (Pet. 8-9) that Lori Guinan voluntarily refused to appear and that her refusal to appear should be treated as a recantation of her grand jury testimony. That argument does not accurately describe what happened at trial.

The parties agreed at trial to defer, until after the trial court had ruled on the admissibility of her statements under Fed. R. Evid. 804(b)(5), consideration of the issue whether petitioner had waived his right to object to Lori Guinan's grand jury testimony by procuring her unavailability. Tr. 2-5, 235-237, 257-258. The district court ruled that

2. After attempting unsuccessfully to locate Lori Guinan, the government notified petitioner on November 30, 1984, that it would offer her grand jury testimony at trial pursuant to Fed. R. Evid. 804(b)(5), the so-called

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Lori Guinan's grand jury testimony was admissible under Rule 804(b)(5) and therefore did not reach the issue whether petitioner was responsible for her absence. In fact, the parties stipulated that Lori Guinan was unavailable. Pet. App. 5 & n.6. Nonetheless, the government presented the following evidence on the issue whether Lori Guinan was unavailable (some of the evidence was presented by proffer, rather than testimony). See generally Gov't C.A. Br. 4-6.

Lori Guinan told Agent McDermott that petitioner had offered her $50,000 not to cooperate with the government (Tr. 28-29, 123). She had also expressed fears for her safety and had inquired about the Witness Protection Program (*id.* at 22-23). Agent McDermott last saw Lori Guinan on November 2, 1984, at which time they arranged to meet on November 7 (Tr. 20). On the evening of November 5, Lori Guinan attended classes at Loyola University. Her teacher and every member of her class were interviewed, and they stated that she appeared to be in normal good spirits and did not tell anyone that she was planning to leave Chicago (*id.* at 238). Lori had previously arranged to meet a close friend at her apartment on the evening of November 5. She did not keep the appointment, however. Instead, she telephoned her friend at approximately 11 p.m. and told him that she would see him the following day (*id.* at 230-232). Lori told her friend that she was calling from an outside telephone booth, but she could not tell him where it was. Lori sounded frustrated and confused, and she repeated her friend's questions out loud in a manner that seemed unusual to her friend (*id.* at 231-232). Following Lori Guinan's disappearence, every known friend and relative was interviewed by federal law enforcement authorities or a Chicago police officer (*id.* at 237-238). When her apartment was searched, all her clothing was found to be there, there was no evidence to indicate that she had taken a trip, and food left on the stove was spoiled (*id.* at 238). The last entry in a daily log kept by Lori Guinan that was found in her apartment was made on November 5 (*id.* at 238). When petitioner was later apprehended in California, tapes of telephone conversations that Lori Guinan was known to have made and that she had kept in her apartment were found in petitioner's possession (*id.* at 8, 238).

residual exception to the hearsay rule. On December 27, petitioner failed to appear for trial, and a warrant was issued for his arrest. He was apprehended in California in April 1985. In May 1985, a second superseding indictment was filed which added two counts of perjury, in violation of 18 U.S.C. 1623, one count of failing to appear, in violation of 18 U.S.C. (Supp. III) 3146(a)(1), and four counts of fraudulent use of social security numbers, in violation of 42 U.S.C. 408(g)(2). Pet. App. 3-4.

On June 18, 1985, the government moved to admit the grand jury testimony of Lori Guinan, and the district court held a hearing on the matter. During the hearing, Agent McDermott testified about the extensive investigation he had conducted to corroborate Lori Guinan's grand jury testimony. At the conclusion of the hearing, the district court ruled that Lori Guinan's grand jury testimony was admissible under Rule 804(b)(5). In support of that ruling, the court found that: (1) petitioner was properly notified of the government's intent to use the grand jury testimony; (2) the government had made a satisfactory showing that Lori Guinan was unavailable; (3) her grand jury testimony contained evidence of material facts relating to the government's proof that petitioner had falsely reported income on his tax returns; (4) because of Lori Guinan's relationship with petitioner, her statements were more probative on that subject than any other available evidence; (5) the interests of justice warranted the admission of her statements; and (6) her statements were made voluntarily and under oath, and were substantially corroborated. The district court also found that petitioner's counsel had ample opportunity to cross-examine Agent McDermott at the hearing regarding Lori Guinan's grand jury statement and the circumstances under which it was prepared. Pet. App. 5; Tr. 259-265.[3]

[3] The court excised portions of Lori Guinan's statement that it found conclusory, irrelevant, or unduly prejudicial. Pet. App. 6.

At trial, the redacted version of Lori Guinan's grand jury testimony was read to the jury. The jury convicted petitioner on six counts of filing false income tax returns, on two counts of fraudulent use of social security numbers, and on one count of failing to appear.[4] He received an aggregate sentence of 16 years in prison. Pet. App. 6.

3. On appeal, petitioner did not challenge his conviction on the charge of failing to appear, but he argued that his conviction on all of the remaining counts should be reversed, because the admission of Lori Guinan's grand jury statement violated both the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment. The court of appeals rejected both claims. After noting that Lori Guinan's grand jury testimony "was given voluntarily under oath and was substantially corroborated by other independent evidence" and after carefully reviewing the record, the court stated that "[w]e are satisfied that there are present in this case sufficient indicia of trustworthiness to meet the requirements of both Rule 804(b)(5) and the Sixth Amendment." Pet. App. 17.

ARGUMENT

1. Petitioner first argues (Pet. 17-25) that the admission of Lori Guinan's grand jury testimony was not authorized by Fed. R. Evid. 804(b)(5). Rule 804, Fed. R. Evid., sets forth the instances in which a hearsay statement by an unavailable declarant is admissible. Rule 804(b)(5) provides that a hearsay statement not covered by any of the exceptions found in subsections (b)(1) through (4), but having equivalent guarantees of trustworthiness, may be admitted if (A) the statement is evidence of a material fact;

[4] The remaining two social security counts were severed and dismissed before trial. Petitioner was acquitted on the two perjury counts. Pet. App. 6 n.8.

(B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can reasonably obtain; (C) admission of the statement serves the interests of justice and the general purposes of the Federal Rules of Evidence; and (D) the proponent has given his adversary notice of his intention to introduce the statement. The courts of appeals have uniformly held that grand jury testimony may be admitted under Rule 804(b)(5) in appropriate circumstances. See, *e.g.*, *United States* v. *Marchini*, 797 F.2d 759, 762-764 (9th Cir. 1986), cert. denied, 479 U.S. 1085 (1987); *United States* v. *Young Brothers, Inc.*, 728 F.2d 682, 692 n.11 (5th Cir.), cert. denied, 469 U.S. 881 (1984); *United States* v. *Thomas*, 705 F.2d 709, 711-712 (4th Cir.), cert. denied, 464 U.S. 890 (1983); *United States* v. *Barlow*, 693 F.2d 954, 960-963 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983); *United States* v. *Boulahanis*, 677 F.2d 586, 589 (7th Cir.), cert. denied, 459 U.S. 1016 (1982); *United States* v. *West*, 574 F.2d 1131, 1135-1136 (4th Cir. 1978); *United States* v. *Garner*, 574 F.2d 1141, 1143-1146 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Carlson*, 547 F.2d 1346, 1355 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

Petitioner does not argue that grand jury testimony is never admissible under Rule 804(b)(5). Rather, as in the courts below, petitioner challenges the admission of Lori Guinan's grand jury testimony on the ground that it lacked circumstantial guarantees of trustworthiness sufficient to render the statement as trustworthy as statements admitted under the first four exceptions in the rule. Both the district court and the court of appeals, however, carefully reviewed the matter and found that her statement was corroborated by other substantial evidence linking petitioner to the expenditures that Lori Guinan testified he had made (Pet. App. 5, 12-15; Tr. 263). The court of appeals also

noted that Lori Guinan's testimony was given under oath before the grand jury and was therefore subject to the penalties of perjury (Pet. App. 9 n.12); that Lori Guinan was not pressured to testify (*id.* at 8-9); and that, even though she volunteered to testify after her marriage to petitioner had deteriorated, there was no evidence that she had a motive to lie or that she had any pecuniary interest in seeing petitioner convicted that would undermine the trustworthiness of her testimony (*id.* at 10-11).[5] Moreover, Lori Guinan related facts within her knowledge and personal observation, and she never recanted her testimony. *Id.* at 9 n.13. She remained steadfast in her decision to testify—both before and after she was promised immunity, and both before and after she had retained an attorney—notwithstanding her fears for her safety and petitioner's offer to pay her $50,000 if she would not testify against him. Tr. 28, 121-124. Under these circumstances, the district court was justified in admitting Lori Guinan's grand jury testimony under Rule 804(b)(5). See, *e.g.*, *United States* v. *Barlow*, 693 F.2d at 962-963; *United States* v. *Boulahanis*, 677 F.2d at 588-589; *United States* v. *Garner*, 574 F.2d at 1143, 1145-1146; *United States* v.

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[5] The testimony read to the jury at trial included Lori Guinan's statement that she had filed for divorce. Pet. App. 10. The jury could therefore take that fact into account in determining whether her grand jury testimony was credible. Moreover, the district court gave a cautionary instruction to the jury, calling the jury's attention to the fact that petitioner did not have the opportunity to confront and cross-examine Lori Guinan, and instructing the jury to consider the statement with "great care and caution" (Gov't C.A. Br. 36). Petitioner testified at trial and therefore had the opportunity to explain any marital discord between Lori and himself. Finally, once Lori Guinan's statement was admitted, it was open to petitioner under Rule 806 of the Federal Rules of Evidence to introduce evidence that would impeach Lori Guinan's credibility.

Carlson, 547 F.2d at 1354. Petitioner's challenge to the court of appeals' holding (see Pet. 5-17) amounts to little more than an attack on that court's fact bound determination that Lori Guinan's testimony was trustworthy. That challenge does not present any question that warrants review by this Court.

Petitioner argues that although the courts below found Lori Guinan's grand jury testimony to be well corroborated by other evidence, the evidence on which the courts relied was not really corroborative of her testimony but was merely consistent with it. The court of appeals' detailed recitation of the evidence that was offered to corroborate the challenged grand jury testimony (Pet. App. 12-14) shows, however, that much of the evidence directly corroborated the statement Lori Guinan made before the grand jury. For example, her statement that petitioner had purchased two condominiums was corroborated by the title histories of those properties (*id.* at 13-14); her statement about petitioner's travels was corroborated by the logbook for one of petitioner's own boats, his own sworn statement in a divorce proceeding, and statements of his employees (*id.* at 12); and Lori Guinan's statement that petitioner said he knew "how to get around the IRS" (*id.* at 24) was corroborated by his remark to one of his former employees that he would "beat the IRS," and by the statement of another former employee that she helped petitioner destroy records that might disclose receipts to the IRS (*id.* at 14).

There is no merit to petitioner's claim (Pet. 29) that the decision below conflicts with the decisions of other courts of appeals that have required "independent corroborating evidence from a non-interested witness" before admitting grand jury testimony under Rule 804(b)(5). None of the cases he cites (Pet. 20-21, 23)[6] holds that the only accept-

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[6] *United States* v. *MacDonald*, 688 F.2d 224 (4th Cir. 1982), cert. denied, 459 U.S. 1103 (1983), involved Rule 804(b)(3), not Rule

able corroboration for that purpose is independent evidence from a disinterested witness. In fact, in *United States* v. *West, supra,* the corroborating witnesses were government agents who were directing the drug-buying activities of the declarant, a cooperating informant. 574 F.2d at 1135. Nor do those cases require that evidence offered to corroborate an out-of-court statement must directly corroborate every aspect of the statement, or that evidence that is merely consistent with the statement cannot be used to corroborate it. In any event, petitioner's distinction between consistent and corroborative evidence is a false one: evidence that is consistent with a statement tends to corroborate it: the greater the consistency, the

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804(b)(5). In that case, the court of appeals held that the out-of-court statement of a declarant that the defendant and his family were the "victims of a bizarre cult attack" (688 F.2d at 230) was not reliable, given the declarant's "apparent longstanding drug habits" and her vacillation as to whether she remembered anything about the crime (*id.* at 233). *United States* v. *Gonzalez,* 559 F.2d 1271 (5th Cir. 1977), held that the grand jury testimony involved in that case should have been excluded because of the pressure placed on the declarant by the prosecutor "to come up with an answer, whether or not it was true," and because his testimony was uncorroborated. *Id.* at 1273. *Gonzalez* did not hold that the grand jury testimony of an unavailable declarant is never admissible under Rule 804(b)(5), and since that decision the Fifth Circuit has indicated that the contrary is true. *Young Brothers, Inc.*, 728 F.2d at 692 n.11. *United States* v. *Barlow, supra,* and *United States* v. *West, supra,* both found admissible the grand jury testimony of an unavailable declarant on the facts of each case, but neither decision adopted the corroboration requirement that petitioner proposes.

Petitioner also asserts (Pet. 29) that the decision below conflicts with a decision from the Ninth Circuit. He cites no Ninth Circuit opinion in his petition, however, and that court has held that the grand jury testimony of an unavailable declarant can be admitted in proper circumstances under Rule 804(b)(5). *United States* v. *Marchini,* 797 F.2d at 762-765.

more complete the corroboration. See, *e.g.*, *Smith* v. *United States*, 348 U.S. 147, 156-159 (1954); *United States* v. *Calderon*, 348 U.S. 160 (1954).[7]

Petitioner argues (Pet. 4-17, 22) that the evidence offered to corroborate Lori Guinan's testimony was insufficient because it consisted of the hearsay recitations of Agent McDermott about his investigation and the statements that others had made to him. But Rule 104(a), Fed. R. Evid., expressly provides that the trial court is not bound by the rules of evidence, including the rules dealing with hearsay, in ruling on the admissibility of evidence. See *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 4-9. If petitioner believed that the agent inaccurately recounted the statements of others or that he inaccurately recited what various records showed, it was open to petitioner to subpoena the witnesses or the records themselves.

Petitioner claims (Pet. 7-8) that Lori Guinan's testimony is of doubtful veracity, because she read to the grand jury a statement prepared by Agent McDermott, instead of tes-

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[7] Petitioner's reliance (Pet. 21-22) on *United States* v. *Silverstein*, 732 F.2d 1338 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985), is also misplaced. *Silverstein* was not concerned with Rule 804(b)(5), but with Rule 804(b)(3), which specifically provides that a statement that inculpates the declarant and exculpates the defendant "is not admissible unless corroborating circumstances *clearly* indicate the trustworthiness of the statement" (emphasis added). In *Silverstein*, the only evidence offered to corroborate the declarant's confession to the murder of a fellow inmate, with which the defendant had been charged, was that the declarant was out of his cell shortly before the victim's corpse was discovered. The court indicated that the corroboration requirement of Rule 804(b)(3) would have been met if other evidence had linked the declarant to the crime. 732 F.2d at 1347. As the court of appeals explained (Pet. App. 12), in this case there was substantial evidence linking petitioner to the expenditures about which Lori Guinan testified.

tifying "spontaneously." The court of appeals believed that petitioner abandoned that claim (see Pet. App. 5 n.7), but it is unpersuasive in any event. The written statement was prepared by Agent McDermott on the basis of Lori Guinan's oral statements; Lori Guinan reviewed the written statement on three occasions for approximately three and one-half hours before her grand jury appearance; and she was given the opportunity to, and did, make the changes she desired. Although the district court found that this procedure was not the best possible method of preserving her testimony, the court found that the procedure was a permissible means of organizing material obtained over a period of time. Tr. 262-263.

Finally, petitioner claims (Pet. 24; see also *id.* at 5-17) that "the grand jury testimony permeated every aspect of the trial." That claim is exaggerated, as we explained in the court of appeals. See Gov't C.A. Br. 21-22. During its case in chief, the government presented the testimony of 109 live witnesses in addition to the grand jury testimony of Lori Guinan. Her grand jury testimony occupies eight pages of the transcript of a trial that lasted more than three weeks and filled more than 2800 pages of transcript. Moreover, Lori Guinan's testimony played only a limited role in the government's proof at trial. Even under petitioner's view of the evidence (Pet. 25), her testimony provided the basis for a portion of petitioner's calculated expenses for 1977-1980, but the government was still able to show through other means that petitioner had substantial unreported income throughout that period.[8] Finally,

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[8] The government used the "expenditures method" of proof for tax years 1977-1980. Under that method of computing income, total expenditures are computed and non-taxable sources of income subtracted. What is left is compared with the income reported on the tax

Lori Guinan's grand jury testimony did not at all relate to the government's proof of the counts relating to 1981 and 1982[9] or to the charge of failing to appear, even under petitioner's view of the evidence.

2. Petitioner also argues (Pet. 25-28) that the admission of Lori Guinan's grand jury testimony violated the Confrontation Clause of the Sixth Amendment. It is well established, however, that the Confrontation Clause does

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return. The following table summarizes the evidence at trial on those counts (Gov't C.A. Br. 21-22):

	1977	*1978*	*1979*	*1980*
Total Known Expenditures	$133,234	$243,982	$334,432	$231,101
Non-Taxable Sources of Funds	76,597	242,563	192,815	119,554
Expenditures Proved In Whole Or In Part By Lori Guinan's Statements	9,100	9,100	34,426	11,374
Unreported Taxable Income Proved By Other Sources	112,806	24,266	9,981	81,826

In sum, for each year evidence from other sources showed sufficient expenditures to establish the falsity of petitioner's tax returns, and for only one year, 1979, could it be said that Lori Guinan's testimony played a significant role in the government's calculations. For that year, moreover, all but $4,575 of the amount attributable to her testimony was well corroborated by petitioner's own log book. Gov't C.A. Br. 22, 34.

[9] For tax years 1981 and 1982, the government used the "specific item" method of proof, in which specifically provable items of interest and dividend income were shown to have been omitted from petitioner's tax returns for those years. Gov't C.A. Br. 21, 34.

not bar the use of all hearsay evidence at trial (*Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980)), nor does it automatically bar the use of hearsay just because the defendant has had no opportunity to cross-examine the declarant. See, *e.g.*, *Bourjaily* v. *United States*, *supra* (co-conspirator declarations); *Dutton* v. *Evans*, 400 U.S. 74 (1970) (same); *Mattox* v. *United States*, 156 U.S. 237 (1895) (dying declarations). A defendant's right to confront witnesses must be balanced against society's "strong interest in effective law enforcement" (*Ohio* v. *Roberts*, 448 U.S. at 64). The balance is struck in favor of admissibility when the declarant is unavailable and his statement "bears adequate 'indicia of reliability' " (*id.* at 66). Reliability, the Court has held, can be inferred without more in a case where the evidence fits within a firmly rooted hearsay exception. *Bourjaily*, slip op. 10. In other cases, "the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66 (footnote omitted).

The decision below is consistent with the foregoing principles. After undertaking a close examination of the record, the court of appeals found particularized guarantees of trustworthiness with respect to Lori Guinan's grand jury testimony, for essentially the same reasons that supported the admission of the evidence under Rule 804(b)(5). Pet. App. 16-17.[10] Other courts of

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[10] The court of appeals was careful to indicate, however, that it was not adopting a per se rule that evidence admissible under Rule 804(b)(5) can always be admitted without violating the Confrontation Clause. The court of appeals acknowledged (Pet. App. 15-16) that this Court's decision in *Ohio* v. *Roberts* requires that an out-of-court statement of an unavailable declarant bear " 'particularized guarantees of trustworthiness' " before it can be admitted at trial (Pet. App. 16 (citations omitted)), but it found that in this case there were adequate indicia of reliability to satisfy the Confrontation Clause.

appeals have also found that the grand jury testimony of an unavailable witness may be admitted in proper circumstances without violating the Confrontation Clause. See *United States* v. *Marchini*, 797 F.2d at 763-765; *United States* v. *Thomas*, 705 F.2d at 711-712; *United States* v. *Barlow*, 693 F.2d at 963-965; *United States* v. *Boulahanis*, 677 F.2d at 589; *United States* v. *West*, 574 F.2d at 1136-1138; *United States* v. *Garner*, 574 F.2d at 1144-1146.[11]

Petitioner does not challenge the court of appeals' approach to this question. He merely reiterates the arguments he made in connection with his Rule 804(b)(5) argument, that the court erred in finding that Lori Guinan's grand jury testimony was substantially corroborated. For the reasons discussed above in connection with

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[11] This Court's decision in *Dutton* v. *Evans*, *supra*, is pertinent here. In *Dutton*, the Court found no Confrontation Clause violation in the admission of a declarant's out-of-court statement that did not fit within a well-established hearsay exception, because the Court found that there were sufficient "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89 (plurality opinion); see *id.* at 88-89 (discussing the indicia of reliability). Those factors have close parallels in this case.

First, the jury was informed of all the circumstances bearing on Lori Guinan's decision to testify against her estranged husband; as in the case of the statement in *Dutton*, the jury had every reason to understand that her testimony had to be viewed with caution—a point that was underscored by the district court in its instructions to the jury. Second, like the declarant in *Dutton*, Lori Guinan had first-hand knowledge of petitioner's expenditures. Third, there was no reason to doubt the accuracy of her recollection. Fourth, petitioner had the opportunity to impeach Lori Guinan's statements by treating them as the vindictive response to a failed marriage. In addition, Lori Guinan testified before the grand jury under oath and therefore exposed herself to a prosecution for perjury if she chose to lie.

the Rule 804(b)(5) claim, petitioner has presented no question warranting review by this Court.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] Petitioner erroneously suggests (Pet. 26-28) that under *Lee* v. *Illinois*, 476 U.S. 530 (1986), evidence that is merely consistent with an out-of-court statement is not sufficient to corroborate the statement. *Lee* involved a confession by one co-defendant implicating another co-defendant, which this Court termed "presumptively unreliable." *Id.* at 541. Although the first co-defendant's confession in *Lee* was consistent with the other co-defendant's confession on some points, there was no corroboration of those portions of the first co-defendant's confession that implicated his co-defendant. Contrary to petitioner's suggestion, *Lee* and *Cruz* v. *New York*, No. 85-5939 (Apr. 21, 1987), indicate that interlocking confessions can be admitted if there is sufficient consistency between them, because that consistency may provide the necessary "indicia of reliability." See *Lee*, 476 U.S. at 545-546. Moreover, as the court of appeals recognized (Pet. App. 16 n.14), *Lee* required identity on all key points between co-defendants' confessions because of the unique problems inherent in that situation. The out-of-court statement in this case, which established some of petitioner's expenditures during the years at issue, is hardly of the same character as a confession of one co-defendant implicating another in the commission of a homicide.

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